

Fair Political Practices Commission
Memorandum

To: Chairman Getman, Commissioners Downey, Knox, and Swanson

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Appeal by Charles H. Bell, Jr. Regarding the Denial of His Request for an Opinion
(File No. O-02-348.)

Date: January 6, 2003

Pursuant to Government Code section 83114(a), the Commission is authorized to issue opinions interpreting the Political Reform Act. Section 83114(a) provides:

“Any person may request the Commission to issue an opinion with respect to his duties under this title. The Commission shall, within 14 days, either issue the opinion or advise the person who made the request whether an opinion will be issued. No person who acts in good faith on an opinion issued to him by the Commission shall be subject to criminal or civil penalties for so acting, provided that the material facts are as stated in the opinion request. The Commission’s opinions shall be public records and may from time to time be published.”

On December 17, 2002, we received a request pursuant to section 83114(a) for an opinion from Charles H. Bell, Jr. on behalf of an unnamed client. (See Attachment 1.) The letter from Mr. Bell declined to reveal the identity of the requestor based on the entity’s alleged right to anonymity. Specifically, the request asked whether the entity could engage in criticism of local elected officers and whether the entity could comment in local ballot measures without becoming a “committee” under the Political Reform Act. The requestor asserts that the entity will not qualify as a committee based on the recent appellate court decision in *Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449.

On December 24, 2002, the Executive Director issued a denial of the opinion request. (See Attachment 2.) Without reaching the merits of requestor’s arguments that (1) an anonymous entity had a right to an opinion under section 83114, or (2) that the *Davis* case in fact changed the existing interpretation of the Act, the Executive Director declined the opinion request based on regulation 18320(f)(5) and (6). Specifically, the Executive Director determined that:

“Your request presents important questions of law, but no factual question appropriate for the issuance of a Commission opinion. Specifically, your request is not one based on material facts that you have provided and is overbroad in that it asks for an interpretation of the Act in general terms.”

In addition, regulation 18320(a) requires that opinion requests may be submitted to the Commission only under the following circumstances:

“(1) The identity of the person whose duties are in question shall be provided with the opinion request. If the opinion request is submitted by the representative of several persons similarly situated, the identity of at least one such person shall be provided with the opinion request.

“(2) The immunity provided by Government Code Section 83114 shall extend only to the person or persons identified in the opinion request.”

This is an important requirement. Unlike a regulation, which is a rule of general application, a Commission opinion is the application of the law *to a specific set of facts*. Both section 83114(a) and regulation 18320(b) recognize that “[o]pinion requests shall present all material facts as concisely as possible and shall state the question or questions based on the facts.” (Regulation 18320(a).) This requirement is imposed because “[N]o person who acts in good faith on an opinion *issued to him* by the Commission shall be subject to criminal or civil penalties for so acting, provided that the material facts are as stated in the opinion request.”¹ (Section 83114(a), emphasis added.)

The denial letter issued in this case also noted that the Commission planned to consider the impact of the *Davis* decision, if any, at a future Commission meeting. The letter stated that if it were decided that some change in advice or regulations was required, the Commission could address these issues as early as March 2003. In other words, the denial did not purport to be a determination of the merits of Mr. Bell’s request. Rather it evaluated whether an opinion was the appropriate remedy, if a remedy is needed. A Commission opinion is only one method of dealing with important policy considerations. In this case, the denial was based on the conclusion that a Commission opinion may not be the best method to address this issue.²

On December 27, 2002, Mr. Bell requested the Commission review the Executive Director’s denial. (See Attachment 3.) Mr. Bell stated four reasons that an opinion on his question was more appropriate than possible regulatory action or Commission advice.³

¹ A review of the most recent opinion requests indicates that requests that fail to identify a specific person with duties under the Act have been routinely denied. (See e.g., *Pavao*, No. 90-001, and *Mullins*, No. O-99-039.)

² The Commission may decline to issue an opinion (and has), even when the request raises important policy considerations. For example, in 1999, Robert Leidigh requested an opinion concerning an identified client who he believed was improperly treated as a “foreign national” under our statute. The Commission debated this important policy consideration. The Commission ultimately decided at its September 10, 1999 meeting that while they agreed with the substance of the request, issuing an opinion was not an appropriate vehicle, and chose instead to pursue legislation.

³ Without considering the merits of Mr. Bell’s request, we would note that there does not appear to be any timing advantage to the Opinion form as opposed to regulatory action, since both would take two or more Commission meetings to complete. In fact, a regulation may be adopted on an emergency basis, if necessary, and could actually be enacted faster than an opinion.

“First, the December 17, 2002 letter contained sufficient operative facts and raised a significant question concerning registration and reporting requirements concerning one aspect of the ‘issue advocacy’ question, to warrant issuance of a formal opinion.” He did not elaborate on what these “facts” were. A review of the original request for opinion reveals few facts. Other than the hypothetical statement that the unnamed entity “wishes to engage in ‘issue advocacy’ activity with respect to criticism of local elected officers and to comment on matters that may qualify for the ballot at the local level,” and the statement that the entity was not a “committee” under the Act, no other facts were evident.⁴

Second, the requestor pointed to the fact that the Commission has adopted numerous opinions in the past four years. That fact alone does not cure the deficiencies in Mr. Bell’s request, nor does it provide any guidance as to why the opinion process is the only way the issue raised in the *Davis* case can be addressed.

Third, the requestor asserts that the question is not over broad, but is limited factually. The requestor states in his appeal that: “The opinion request presented factual questions: an existing entity wishes to undertake activity that would, under current regulations, but not under the *Davis* opinion, require it to register, report and disclose the identity of donors.” However, the over breadth of the opinion request is self-evident when you refer to the questions presented in the original request. On page 1 and 2 of his letter, Mr. Bell asked the Commission to confirm that:

“... (1) it will **follow** the *Davis* decision in construing Government Code Section 82025 and Title 2, Cal.Code Regs., Section 18225(b)(2), to apply an ‘express words of advocacy’ standard to the determination of whether an expenditure ‘expressly advocates’ the election or defeat of a clearly identified *local candidate or ballot measure*, for purposes of the registration and reporting requirements of the Political Reform Act, and (2) it will **not** enforce the last sentence of Regulation 18225(b)(2), to regulate a communication ‘that otherwise refers to a clearly identified *local candidate or ballot measure* so that the communication, taken as a whole, unambiguously urges a particular result in an election.” [Emphasis in original.]⁵

In essence, the request asks the Commission, by Commission opinion, to amend regulation 18225(b)(2). If such a change is necessary, it is more appropriately done by means of formal regulatory action consistent with the Administrative Procedures Act.

⁴ Also, while Mr. Bell has identified himself as a person responsible for a person whose duties are in question, it does not appear he is a person similarly situated to the entity in question as required by the regulation.

⁵ We are not certain whether Mr. Bell seeks an opinion applicable only to speech related to local candidates and ballot measures. Mr. Bell’s statement of the question on pages 1 and 2 misquotes the applicable regulation and limits it to “local candidates and committees.” His later restatement of the question does not reference “local candidates and committees.”

Fourth, the requestor asserts the fact “that an opinion request may also require the Commission to consider broader regulatory amendments is not uncommon.” We do not disagree.⁶ However, it is rare when an opinion request asks that the Commission ignore language from a formally adopted regulation as this request does.

We recommend that the Commission ratify the Executive Director’s denial of the opinion request.

Attachments

1. Request for Formal Opinion from Charles H. Bell, Jr., dated December 17, 2002.
2. Denial of Opinion Request from Executive Director Mark Krausse, dated December 24, 2002.
3. Request for Review of Executive Director’s Denial of Request for Formal Opinion -- File No. O-02-348, dated December 26, 2002.

⁶ It is also not uncommon for regulatory actions to affect the duties of individuals. If requestor argues that this negates the use of regulatory action in those situations, the requestor would in essence abolish the Commission’s rulemaking authority.